

No. 11197

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. A. HAGEN, individually, and doing business as
El Rey Cheese Co., JACK AROS and EVER-
ETT HAGAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED
JAN 25 1946

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

ABRAHAM GOTTFRIED,
403 West 8th St.,
Los Angeles 14, Calif.

For Appellee:

H. EUGENE BREITENBACH,
WM. U. HANDY,
ELEANOR SHUR,
1031 S. Broadway,
Los Angeles 15, Calif. [1*]

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In the District Court of the United States, Southern District of California, Central Division

No. 4819-BH—Civil

CHESTER BOWLES, Administrator, Office of
Price Administration,

Petitioner,

vs.

J. A. HAGAN, Individually, and doing business
as EL REY CHEESE CO.; JACK AROS and
EVERETT HAGAN,

Respondents.

PETITION FOR AN ORDER REQUIRING RE-
SPONDENTS TO TESTIFY AND TO PRO-
DUCE CERTAIN DOCUMENTS

Chester Bowles, Administrator of the Office of Price Administration, Petitioner herein, applies to this Honorable Court, pursuant to Sections 205(a) and 202(e) of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23; U.S.C.A. Title 50 App., Sections 901-946), as amended, (Pub. L. 383, 78th Cong. 2nd Sess.; Pub. L. 108, 79th Cong. 1st Sess.), hereinafter called the "Act," for an order requiring respondents and each of them to testify and produce certain documents described in the Subpoena Duces Tecum hereinafter mentioned. In support hereof, petitioner respectfully represents as follows: [2]

1. At all times herein mentioned J. A. Hagan was and now is an individual doing business under

the fictitious firm name and style of El Rey Cheese Co. at 119-121 North Eastern Avenue, in the City of Los Angeles, County of Los Angeles, State of California, and within the judicial district of the above entitled Court.

Your petitioner is informed and believes and upon such information and belief alleges that at all times herein mentioned Jack Aros was and now is the bookkeeper, agent, employee and attorney-in-fact of respondent J. A. Hagan, doing business as El Rey Cheese Co., located in the City of Los Angeles, County of Los Angeles, State of California, and within the judicial district of the above entitled Court.

Your petitioner is informed and believes and upon such information and belief alleges that at all times herein mentioned respondent Everett Hagan was and now is the manager, agent and employee of respondent J. A. Hagan, doing business as El Rey Cheese Co., located in the City of Los Angeles, County of Los Angeles, State of California, and within the judicial district of the above-entitled Court.

Your petitioner is informed and believes and upon such information and belief alleges that at all times herein mentioned respondents and each of them were and now are engaged in the business of selling, at wholesale, various types of cheeses subject to the provisions of Maximum Price Regulation No. 280, as amended, Revised Maximum Price Regulation No. 289, as amended, and the General Maximum Price Regulation, as amended.

2. Jurisdiction of this proceeding is conferred upon this Court by Sections 205(c) and 202(e) of the Act.

3. Your petitioner is empowered under the provisions of Section 202(a) of the Act to make such studies and investigations, to conduct such hearings and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation [3] or order under the Act or in the administration and enforcement of the Act, and regulations and orders issued thereunder, and to assist him in carrying out said powers the Administrator is empowered to require by subpoena any person to appear and testify or to appear and produce documents, or both, at any designated place.

4. On or about May 24, 1945, petitioner deemed that an investigation to determine if there was evidence that respondents and each of them had complied with the provisions of the Act and the regulations thereunder was necessary to assist in the administration and enforcement of the Act and regulations thereunder, and such investigation was commenced on or about said date on petitioner's behalf by Clyde P. Cowgill, an investigator of the Los Angeles District Office of the Office of Price Administration and in the employe of petitioner.

5. In conducting said investigation, it was deemed necessary to obtain information from the records and documents kept by and on behalf of the El Rey Cheese Co. in the regular course of busi-

ness, which information could most efficiently be obtained by an inspection of said respondents' records required to be kept under the provisions of Section 1351.812 of Maximum Price Regulation No. 280, as amended, Section 1351.807 of Temporary Maximum Price Regulation No. 22, as amended, and Section 5 of Maximum Price Regulation No. 289, as amended, and the records of said company showing the prices paid and charged for certain cheeses bought and sold after the effective dates of said regulations.

6. On several occasions, said investigator requested of respondents and each of them herein that they allow an inspection by the Office of Price Administration of certain records of respondents and each of them pertaining to the sale of certain cheeses subject to Maximum Price Regulation No. 280, as amended, and Maximum Price Regulation No. 289, as amended, which records are described in Exhibit "A" hereto attached, but respondents and each [4] of them refused the inspection of said records.

7. Thereafter, under date of June 9, 1945, a Subpoena Duces Tecum was signed and issued by John O'Connor, Acting District Director of the Los Angeles District Office of the Office of Price Administration, on behalf of the petitioner, directing respondents and each of them to appear before the aforesaid Clyde P. Cowgill to testify and to produce the documents and records described in said Exhibit "A," at Room 441 (425), 1031 South

Broadway, Los Angeles, California, on the 11th day of June, 1945, at the hour of 8:00 A. M.

Petitioner is informed and believes and upon such information and belief alleges that said subpoenas duces tecum were served personally on the respondents, Jack Aros and Everett Hagan, on the 9th day of June, 1945, as shown by the Affidavit of Merle B. Swan, attached hereto and made a part hereof, showing the serving of one duplicate original each of said Subpoena Duces Tecum upon Jack Aros and Everett Hagan.

8. Respondents and each of them refused and still refuse to and did not appear to testify at the time and place designated in the subpoena. Respondents and each of them refused to and did not produce any of the documents and records described in said Subpoena Duces Tecum (Exhibit "A") at the time and place designated therein nor at any time in response to said subpoena, and respondents and each of them have not permitted the inspection of any of said documents at any time in response to said subpoena.

9. Thereafter, under date of August 2, 1945, petitioner himself signed and issued certain subpoenas duces tecum, directing the respondents and each of them to appear to testify and to produce the documents and records described in Exhibits "B" and "C," at Room 441, 1031 South Broadway, Los Angeles, California, the Los Angeles District Office of the Office of Price Administration, before Eleanor Shur, Enforcement Attorney, on

the 16th day of [5] August, 1945, at the hour of 9:00 A. M.

Petitioner is informed and believes and upon such information and belief alleges that said subpoenas were personally served on respondents Jack Aros and Everett Hagan on the 13th day of August, 1945, in Los Angeles, California, as shown by said affidavit of Merle B. Swan attached hereto and made a part hereof. True copies of said subpoenas, setting forth the documents respondents and each of them were required to produce, are attached hereto, marked Exhibits "B" and "C" and made a part hereof by this reference as completely as though set forth herein at length.

10. Respondents and each of them refused to and did not appear to testify at the time and place designated in said subpoenas issued by petitioner and respondents and each of them have not since appeared to testify in response to said subpoenas. Respondents and each of them refused to and did not produce any of the documents and records described in said subpoenas at the time and place designated therein, nor at any time or place in response to said subpoenas, and respondents and each of them have not permitted the inspection of any of said documents at any time in response to said subpoenas.

11. Petitioner is informed and believes and upon such information and belief alleges that all of said documents described in said subpoenas and required to be produced by them are now and were

at the time of the issuance of said subpoena relevant and material to the said investigation, and that the testimony of respondents and each of them required by said subpoenas is also relevant thereto.

Petitioner is informed and believes and upon such information and belief alleges that the documents required by said subpoenas to be produced are now and at all times herein mentioned have been under the control of the respondents Jack Aros and Everett Hagan or either of them. [6]

Wherefore, petitioner Chester Bowles, Administrator of the Office of Price Administration, prays that

1. An order to show cause shall issue forthwith, directing respondents and each of them to appear before this Court on a day certain to be fixed in said order, and show cause, if any there be, why an order should not issue requiring the respondents and each of them to appear in order to testify and produce the documents described in said subpoenas duces tecum before an officer designated by the Administrator at such time and place as this Court may order;

2. Upon return of the order to show cause, an order shall issue requiring respondents and each of them to appear to testify and to produce before such officer at such time and place as this Court may order the documents described in said subpoenas duces tecum; and

3. The petitioner may have such other and further relief as may be necessary or appropriate.

H. EUGENE BREITENBACH,
WM. U. HANDY,
ELEANOR SHUR.

By ELEANOR SHUR,
Attorneys for Petitioner. [7]

State of California,
County of Los Angeles—ss.

Eleanor Shur, being first duly sworn, deposes and says:

That she is an Enforcement Attorney for the Office of Price Administration, Los Angeles District Office, and she is one of the attorneys for petitioner in the foregoing Petition for an Order Requiring Respondents to Testify and to Produce Certain Documents. That she has read the foregoing petition and knows the contents thereof to be true of her own knowledge except for such matters as are stated on information and belief, and as to such matters she is informed and believes the contents to be true.

ELEANOR SHUR.

Subscribed and sworn to before me this 28th day of September, 1945.

[Seal] SAMUEL R. GARB,
Notary Public in and for said
County and State.

My Commission Expires Feb. 4, 1949. [8]

EXHIBIT "A"

(Copy)

United States of America
Office of Price Administration

SUBPOENA DUCES TECUM

To: Everett Hagan and Jack Aros, El Rey Cheese Co., 119-121 North Eastern Avenue, Los Angeles, California.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before Clyde P. Cowgill of the Office of Price Administration, at 1031 South Broadway, Room 441 (Rm. 425) in the City of Los Angeles on the 11th day of June, 1945, at 8 o'clock A. M. of that day, to testify concerning the sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese for the period from September 28 to October 2, 1942, and for the period from June 15, 1944, to and including June 8, 1945.

And you are hereby required to bring with you and produce at said time and place the following documents:

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from June 15, 1944, to and including June 8, 1945, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese. [9]

Fail Not at Your Peril.

In Witness Whereof, the undersigned, Acting District Director of the Office of Price Administration, has hereunto set his hand at Los Angeles, California, this 9th day of June, 1945.

/s/ JOHN O'CONOR,

Acting District Director. [10]

EXHIBIT "B"

(Copy)

United States of America
Office of Price Administration

SUBPOENA DUCES TECUM

To: Jack Aros, Bookkeeper, Agent and Attorney-in-Fact of J. A. Hagan, d/b/a El Rey Cheese Company.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before Eleanor Shur, Enforcement Attorney of the Office of Price Administration, at 1031 South Broadway, Room 441, in the City of Los Angeles, on the 16th day of August,

1945, at 9 o'clock A. M. of that day, to testify concerning the sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese for the period from September 28 to October 2, 1942, and for the period from June 15, 1944, to and including July 28, 1945.

And you are hereby required to bring with you and produce at said time and place the following documents:

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from June 15, 1944, to and including July 28, 1945, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss [11] Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

Fail Not at Your Peril.

In Witness Whereof, the undersigned, Price Administrator of the Office of Price Administration, has hereunto set his hand at Washington, D. C. this 2nd day of August, 1945.

/s/ CHESTER BOWLES,

Price Administrator. [12]

EXHIBIT "C"

(Copy)

United States of America
Office of Price Administration

SUBPOENA DUCES TECUM

To: Everett Hagan, Manager of El Rey Cheese Company, 119-121 North Eastern Avenue, Los Angeles, California.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before Eleanor Shur, Enforcement Attorney, of the Office of Price Administration, at 1031 South Broadway, Room 441, in the City of Los Angeles, on the 16th day of August, 1945, at 9 o'clock A. M. of that day, to testify concerning the sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese for the period from September 28 to October 2, 1942, and for the period from June 15, 1944, to and including July 28, 1945.

And you are hereby required to bring with you and produce at said time and place the following documents:

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, covering the purchase, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere

Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

All the books, records, ledgers, day books, purchase and sales invoices, etc., of the El Rey Cheese Co. for the period from June 15, 1944, to and including July 28, 1945, covering the purchases, sales and deliveries [13] made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

Fail Not at Your Peril.

In Witness Whereof, the undersigned Price Administrator of the Office of Price Administration, has hereunto set his hand at Washington, D. C., this 2nd day of August, 1945.

/s/ CHESTER BOWLES,

Price Administrator. [14]

State of California,
County of Los Angeles—ss.

AFFIDAVIT OF MERLE B. SWAN

Merle B. Swan, being first duly sworn, deposes and says:

That affiant is an investigator in the employe of the Los Angeles District Office of the Office of Price Administration.

That on June 9, 1945, affiant received a Subpoena Duces Tecum signed by John O'Connor, Act-

ing District Director of the Los Angeles District Office of the Office of Price Administration, in the form of the copy marked Exhibit "A" and attached to the petition herein, of which this affidavit is a part; that on said day affiant served said Subpoena Duces Tecum on Everett Hagan and Jack Aros, respondents herein, at 119-121 North Eastern Avenue, Los Angeles, California, by delivering a duplicate original thereof to Everett Hagan personally and a duplicate original thereof to Jack Aros personally, and exhibiting the original thereof to each of said respondents.

That on August 13, 1945, affiant received a Subpoena Duces Tecum signed by Chester Bowles, petitioner herein, in the form of the copy marked Exhibit "B" and attached to the petition herein, of which this affidavit is a part; that on said day affiant served said Subpoena Duces Tecum on Jack Aros, respondent herein, at 3948 South Grand Avenue, Los Angeles, California, by delivering a true copy thereof to said Jack Aros personally and exhibiting the original thereof to him.

That on August 13, 1945, affiant received a Subpoena Duces Tecum signed by Chester Bowles, petitioner herein, in the form of the copy marked Exhibit "C" and attached to the petition herein, of which this affidavit is a part; that on said day affiant served said Subpoena Duces Tecum on Everett Hagan, respondent herein, [15] at 119-121 North Eastern Avenue, Los Angeles, California, by delivering a true copy thereof to said Everett Hagan

personally and exhibiting the original thereof to him.

MERLE B. SWAN,

Subscribed and sworn to before me this 1st day of October, 1945.

[Seal]

SAMUEL R. GARB,

Notary Public in and for Said
County and State.

My Commission Expires Feb. 4, 1949.

[Endorsed]: Filed Oct. 10, 1945. [16]

[Title of District Court and Cause.]

AFFIDAVIT OF ELEANOR SHUR

State of California,

County of Los Angeles—ss.

Eleanor Shur, being first duly sworn, deposes and says:

That she is an attorney in the employe of the Office of Price Administration.

That on or about June 9, 1945, on behalf of petitioner herein, affiant caused to be drawn a Subpoena Duces Tecum, pursuant to Sections 202(b) and 202(c) of the Emergency Price Control Act of 1942, as amended. That a copy of said subpoena is attached to the petition herein and marked Exhibit "A." That said subpoena [17] was signed by John O'Connor, who on the 9th day of June, 1945, was Acting District Director of the Los Angeles

District Office of the Office of Price Administration.

That subsequent to June 9, 1945, and prior to June 11, 1945, William Leavitt, who purported to be the attorney representing Everett Hagan and Jack Aros, and the El Rey Cheese Company, telephoned the Enforcement Division of the Los Angeles District Office of the Office of Price Administration and stated that the time allowed on said subpoena was too short and, therefore, his clients would not appear. That affiant, subsequent to the service of said subpoenas and subsequent to said telephone call, but prior to 8 o'clock A. M. on June 11, 1945, telephoned said William Leavitt and was informed by him that, under no circumstances, would he permit his clients to answer to said subpoenas but would require that the Los Angeles District Office of the Office of Price Administration obtain a subpoena signed personally by Chester Bowles.

That affiant was informed and believed that Chester Bowles, at that time, was absent from the National Office of the Office of Price Administration and, therefore, affiant did not communicate with said National Office until June 26, 1945, at which time affiant wrote a memorandum to Fleming James, Jr., Director of the Litigation Division of the National Office of the Office of Price Administration, setting forth the information which affiant desired to obtain from Everett Hagan and Jack Aros, and the El Rey Cheese Co., and requesting that said Fleming James, Jr., obtain the sig-

nature of Chester Bowles on a Subpoena Duces Tecum directed to said Everett Hagan and Jack Aros, and the El Rey Cheese Co., and requiring that said persons appear before an officer of the Los Angeles District Office of the Office of Price Administration and testify to certain matters and produce certain records.

That under date of August 2, 1945, the Los Angeles District Office received a Subpoena Duces Tecum directed to Jack [18] Aros (attached to the petition herein and marked Exhibit "B" thereto) and a Subpoena Duces Tecum directed to Everett Hagan (attached to the petition herein and marked Exhibit "C" thereto), each of said documents purporting to bear the signature of Chester Bowles. That accompanying said subpoenas was a memorandum directed to George Shaw, Acting Chief, Food Enforcement Section, Attention: Eleanor Shur, from Fleming James, Jr., setting forth, in part, that "the originals have been signed personally by the Administrator."

That, according to the affidavit (attached to the petition herein) of Merle B. Swan, an investigator of the Office of Price Administration, Everett Hagan and Jack Aros were each served personally with the said appropriate Subpoena Duces Tecum by the delivery of a true copy thereof to each of them personally and exhibiting the appropriate original thereof to each of them.

That on the 15th day of August, 1945, in the forenoon thereof, affiant telephoned the home of Abraham Gottfried, who purported to be one of the

attorneys representing Everett Hagan and Jack Aros, and the El Rey Cheese Co., and informed him that, although other Federal employes had been given a holiday on both the 15th and 16th of August, 1945, by proclamation of the President of the United States, affiant had not taken advantage of said holidays, was working, and would be present in the Los Angeles District Office of the Office of Price Administration on the 16th day of August, 1945, at 9 o'clock A. M., which time was the return date on the subpoenas duces tecum which had been served on Everett Hagan and Jack Aros, and that affiant further informed said Abraham Gottfried that she would be present in said Los Angeles District Office for the purpose of obtaining the records and taking the testimony of the persons named in said subpoenas duces tecum and served by Merle B. Swan.

That on the 16th day of August, 1945, said Abraham Gottfried appeared at the Los Angeles District Office alone without [19] either Everett Hagan, Jack Aros, or any other representative of the El Rey Cheese Co., and made a statement, which statement was recorded and transcribed by Tilley Geppert, an employee of the Los Angeles District Office of the Office of Price Administration, in the presence of affiant and Abraham Gottfried. That said Abraham Gottfried left the Los Angeles District Office prior to the completion of the transcription of said statement and that on the 17th day of August, 1945, the original and a copy of said transcription was sent to Abraham Gottfried's of-

fice for his signature. A copy of said transcription of said statement by Abraham Gottfried is attached hereto and marked Exhibit "1."

That at no time since August 16, 1945, nor at any time prior thereto, have J. A. Hagan, Jack Aros, Everett Hagan nor any other representative or agent of or attorney for the El Rey Cheese Co. appeared at the Office of Price Administration to testify and/or to produce the documents and records subpoenaed by the subpoenas attached to the petition herein and marked Exhibits "B" and "C" thereto.

ELEANOR SHUR.

Subscribed and Sworn to before me this 4th day of October, 1945.

[Seal]

SAMUEL R. GARB,

Notary Public in and for Said
County and State.

My Commission Expires Feb. 4, 1949. [20]

EXHIBIT No. 1

In the presence of Eleanor Shur, Enforcement Attorney, and Tilley Geppert, on August 16, 1945, at the hour of 9:00 A.M., in the Enforcement Division of the Los Angeles District Office of the Office of Price Administration, Room 441, 1031 South Broadway, Los Angeles, California, Abraham Gottfried, attorney for Everett Hagan and Jack Aros, appeared on behalf of said Everett Hagan and Jack Aros specially in answer to Subpoenas Duces Tecum issued on August 2, 1945,

by Chester Bowles, Administrator of the Office of Price Administration, and makes the following statement.

I am appearing specially on behalf of Everett Hagan and Jack Aros for the purpose of quashing the issuance and service of the alleged Subpoena Duces Tecum served upon Everett Hagan and the alleged Subpoena Duces Tecum served upon Jack Aros. The grounds are as follows:

1. The President of the United States by Executive Order has declared August 16, 1945, a legal holiday for all Federal offices. I was advised by telephone communication to my home on August 15, 1945, by Miss Eleanor Shur that despite the fact that the Federal offices would be closed she would be present in Room 441, 1031 South Broadway, Los Angeles, California, for the purpose of taking the testimony and inspecting the documents referred to in the aforesaid alleged Subpoenaes Duces Tecum; that this communication reached me too late to communicate with my clients prior to the time said alleged Subpoenaes Duces Tecum were returnable.

2. I question the authenticity of the subpoenaes and state that, in my opinion, the said Subpoenaes Duces Tecum were not signed by Chester Bowles, whose signature purportedly appears thereon.

3. The said Subpoenaes Duces Tecum do not grant the notice required by law in that said Subpoenaes Duces Tecum were served on the 13th day

of August, 1945, and required an appearance on the 16th day of August, 1945. [21]

4. Said Subpoenaes Duces Tecum violated the Fourth Amendment of the Constitution of the United States.

5. The information requested in said Subpoenaes Duces Tecum is not material to any investigation authorized or contemplated by the Office of Price Administration or by the Price Administrator, nor is the proposed testimony nor the proposed records within the authority of the Office of Price Administration to elicit, demand or obtain.

Dated: August 16, 1945.

/s/ ABRAHAM GOTTFRIED.

Witnesses:

.....

[Endorsed]: Filed Oct. 10, 1945. [22]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the verified petition of Chester Bowles, Administrator of the Office of Price Administration, filed on the 10th day of October, 1945, and the affidavits of Merle B. Swan and Eleanor Shur filed in support thereof, and good cause appearing therefor,

It Is Hereby Ordered that respondents and each of them show cause, if any there be, before the above entitled Court on the 29th day of October, 1945, at 10 o'clock a.m. or as soon thereafter as counsel can be heard in the Court Room of said Court at Room 6, U. S. Post Office and Court House [27] Building, Temple and Spring Streets, in the City of Los Angeles, County of Los Angeles, State of California, why an order should not issue requiring respondents and each of them to appear before an officer of the Office of Price Administration at such time and place as this Court may require, to testify and to produce the documents described in the subpoenas duces tecum attached to the petition filed herein.

It Is Further Ordered that service of this Order to Show Cause be made by serving a copy thereof together with a copy of the petition filed herein and copies of the affidavits of Merle B. Swan and Eleanor Shur upon said respondents and each of them on or before the 17th day of October, 1945.

Dated at Los Angeles, California, this 10th day of October, 1945.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Oct. 10, 1945. [28]

[Title of District Court and Cause.]

REPLY OF RESPONDENTS J. A. HAGAN, INDIVIDUALLY AND DOING BUSINESS AS EL REY CHEESE CO.; JACK AROS AND EVERETT HAGAN, TO ORDER TO SHOW CAUSE ISSUED OCTOBER 10, 1945, AND RETURNABLE OCTOBER 29, 1945, AND MEMORANDUM IN OPPOSITION TO PETITION FOR AN ORDER REQUIRING RESPONDENTS TO TESTIFY AND PRODUCE CERTAIN DOCUMENTS

Respondents, Jack Aros and Everett Hagan, in reply to the Order to Show Cause hereinbefore issued in the above entitled matter on the 10th day of October, 1945, and in opposition to the petition for an order requiring respondents to testify and produce certain documents, respectfully represent as follows:

I.

There has been no showing that the subpoenas in question were served personally upon all of the respondents named in the Order to Show Cause, nor has there been any showing that the Order to Show Cause has been served upon all of the respondents named therein.

II.

That there has been no sufficient showing that the subpoenas in question were executed and issued by Chester Bowles, the Price Administrator; that the petition on its face discloses that [29] the allegations of execution are based purely on hearsay.

III.

That the books, papers, documents and testimony referred to are not relevant or material to any investigation which the Office of Price Administration is authorized to make, and there has been no showing that such books, papers, documents or testimony are relevant and material to the investigation. Before the court can issue any order there must be proof of the materiality and relevancy of said books, documents and records.

IV.

There has been no showing which commodity is being investigated, nor which of the regulations issued by the Office of Price Administration governs the sales of said commodity. In this respect three regulations are referred to in the petition, each requiring the keeping of different records, and each covering different commodities.

V.

That there has been no failure of respondents to answer and appear at the time and place called for in said subpoenas.

VI.

That the respondents are unable to determine what documents are required or referred to by the letters "etc." appearing in said subpoenas.

VII.

That the said subpoenas constitute an unreasonable search and seizure contrary to the Fourth

Amendment to the Constitution of the United States.

VIII.

That the said subpoenas violated respondents right against self incrimination, contrary to the Fifth Amendment to the Constitution of the United States.

Wherefore, respondents, Jack Aros and Everett Hagan, pray [30] that the petition be denied and dismissed, and that no Order issue in this matter, and that the issuance and service of the alleged subpoenas be quashed.

Respectfully submitted,

ABRAHAM GOTTFRIED

Attorney for Respondents

[Endorsed]: Filed Oct. 29, 1945. [31]

[Title of District Court and Cause.]

AFFIDAVIT

County of Los Angeles,

State of California—ss.

Jesus Aros, being served herein as Jack Aros, being first duly sworn, deposes and says:

That he is informed and believes, and on the basis of said information and belief, denies that on or about May 24, 1945, petitioner deemed that an investigation was necessary to determine if there was evidence that respondents and each of them had complied with the provisions of the Act and the

regulations thereunder to assist in the administration and enforcement of the Act and regulations thereunder, and based upon said information and belief further denies that such an investigation was commenced on or about said date on the petitioner's behalf by Clyde P. Cowgill, an investigator of the Los Angeles District Office of the Office of Price Administration and in the employ of petitioner. [39]

That affiant is informed and believes, and based upon said information and belief, denies that in conducting said investigation it was deemed necessary to obtain information from the records and documents kept by and on behalf of the El Rey Cheese Company, in the regular course of business, which information could most efficiently be obtained by an inspection of said respondents' records required to be kept under the provisions of Section 1351.812 of Maximum Price Regulation 280, as amended, Section 1351.807 of Temporary Maximum Price Regulation 22, as amended, and Section 5 of Maximum Price Regulation 289, as amended, and the records of said company showing the prices paid and charged for certain cheeses bought and sold after the effective dates of said regulations.

That affiant is informed and believes, and therefore alleges, that the subpoena served upon him was not executed by Chester Bowles, the Administrator of the Office of Price Administration; that affiant is unable to ascertain from the said subpoena what books, records, ledgers, day books, purchase and sales invoices, and what other records are required

to be produced pursuant to the subpoena set forth as Exhibit "C" in the petition since affiant is unable to ascertain what is meant by the word "etc."

That affiant denies that said Clyde P. Cowgill requested of respondent and each of them that they allow an inspection by the Office of Price Administration of certain records or any records, and affiant denies that respondents and each of them refused the inspection of said records.

That affiant further denies that under date of June 9, 1945, a subpoena duces tecum was signed and issued by John O'Connor, Acting District Director of the Los Angeles District Office of the Office of Price Administration on behalf of the petitioner and directing respondents and each of them to appear before Clyde P. Cowgill to testify and to produce documents and records on the 11th day of June, 1945, at the hour of 8:00 a.m. [40]

That affiant denies that respondents and each of them refused and still refuse to and did not appear to testify at the time and place designated in said subpoena; and affiant denies that respondents and each of them refused to and did not produce any of the documents and records described in the subpoena duces tecum at the time and place designated therein, nor at any time in response to said subpoena; and further denies that respondents and each of them refused the inspection of any of said documents at any time in response to said subpoena.

That affiant is informed and believes and on the basis of said information and belief, denies that thereafter under date of August 2, 1945, petitioner

signed and issued certain subpoenas duces tecum, directing the respondents and each of them to appear to testify and to produce the documents and records described in Exhibits "B" and "C" of the petition, in Room 441, 1031 South Broadway, Los Angeles, California, of the Los Angeles District Office of the Office of Price Administration, before Eleanor Shur, Enforcement Attorney, on the 16th day of August, 1945, at the hour of 9:00 a.m.

That affiant further denies that respondent and each of them refused to and did not appear to testify at the time and place designated in said subpoena allegedly issued by the petitioner, and denies that respondents and each of them have not since appeared to testify in response to said subpoena; that affiant further denies that respondents and each of them refused to and did not produce any of the documents and records described in said subpoena at the time and place designated therein, nor at any time or place in response to said subpoena; and affiant further denies that respondents and each of them have not permitted the inspection of any of said documents at any time in response to said subpoena.

That affiant is informed and believes, and upon such information and belief denies that all of said documents described in [41] said subpoenas and required to be produced by affiant are now and were at the time of the issuance of said subpoena relevant and material to said investigation, or any investigation, and denies upon such information and belief that the testimony of respondents and each

of them required by said subpoenas is also relevant thereto.

That affiant is informed and believes, and upon such information and belief, denies that the documents required by said subpoenas to be produced are now and at all times mentioned in the petition have been under the control of the respondents Jack Aros and Everett Hagan, or either of them.

That all the books and records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Company are the property of J. A. Hagan, doing business as the El Rey Cheese Company, and are not under the control of affiant nor are they affiant's property.

JESUS AROS

Subscribed and sworn to before me this 26th day of October, 1945.

[Seal]

MACARIO V. BALLESTEROS

Notary Public in and for said
County and State.

Received copy of the within affidavit this 29th day of October, 1945.

ELEANOR SHUR

Attorney for Petitioner

[Endorsed]: Filed Oct. 29, 1945. [42]

[Title of District Court and Cause.]

AFFIDAVIT

County of Los Angeles,
State of California—ss.

Everett Hagan, being first duly sworn, deposes and says:

That he is informed and believes, and on the basis of said information and belief, denies that on or about May 24, 1945, petitioner deemed that an investigation was necessary to determine if there was evidence that respondents and each of them had complied with the provisions of the Act and the regulations thereunder to assist in the administration and enforcement of the Act and regulations thereunder, and based upon said information and belief further denies that such an investigation was commenced on or about said date on the petitioner's behalf by Clyde P. Cowgill, an investigator of the Los Angeles District Office of the Office of Price Administration and in the employ of petitioner.

That affiant is informed and believes, and based upon said information and belief, denies that in conducting said investigation it was deemed necessary to obtain information from the records and documents kept by and on behalf of the El Rey Cheese Company, in the regular course of business, which information could most efficiently be obtained by an inspection of said respondents' records required to be kept under the provisions of Section 1351.812 of Maximum Price Regulation 280, as amended, Section 1351.807 of Temporary Maximum Price Regulation 22, as amended, and Section 5 of Maximum Price Regulation 289, as amended, and

the records of said company showing the prices paid and charged for certain cheeses bought and sold after the effective dates of said regulations.

That affiant is informed and believes, and therefore alleges, that the subpoena served upon him was not executed by Chester Bowles, the Administrator of the Office of Price Administration; that affiant is unable to ascertain from the said subpoena what books, records, ledgers, day books, purchase and sales invoices, and what other records are required to be produced pursuant to the subpoena set forth as Exhibit "C" in the petition since affiant is unable to ascertain what is meant by the word "etc."

That affiant denies that said Clyde P. Cowgill requested of respondents and each of them that they allow an inspection by the Office of Price Administration of certain records or any records, and affiant denies that respondents and each of them refused the inspection of said records.

That affiant further denies that under date of June 9, 1945, a subpoena duces tecum was signed and issued by John O'Connor, Acting District Director of the Los Angeles District Office of the Office of Price Administration on behalf of the petitioner and directing respondents and each of them to appear before Clyde P. Cowgill to testify and to produce documents and records on the 11th day of June, 1945, at the hour of 8:00 a.m. [44]

That affiant denies that respondents and each of them refused and still refuse to and did not appear to testify at the time and place designated in said subpoena; and affiant denies that respondents and

each of them refused to and did not produce any of the documents and records described in the subpoena duces tecum at the time and place designated therein, nor at any time in response to said subpoena; and further denies that respondents and each of them refused the inspection of any of said documents at any time in response to said subpoena.

That affiant is informed and believes and on the basis of said information and belief, denies that thereafter under date of August 2, 1945, petitioner signed and issued certain subpoenas duces tecum, directing the respondents and each of them to appear to testify and to produce the documents and records described in Exhibits "B" and "C" of the petition, in Room 441, 1031 South Broadway, Los Angeles, California, of the Los Angeles District Office of the Office of Price Administration, before Eleanor Shur, Enforcement Attorney, on the 16th day of August, 1945, at the hour of 9:00 a.m.

That affiant further denies that respondents and each of them refused to and did not appear to testify at the time and place designated in said subpoena allegedly issued by the petitioner, and denies that respondents and each of them have not since appeared to testify in response to said subpoena; that affiant further denies that respondents and each of them refused to and did not produce any of the documents and records described in said subpoena at the time and place designated therein, nor at any time or place in response to said subpoena; and affiant further denies that respondents and each of them have not permitted the inspection of any of

said documents at any time in response to said subpoena.

That affiant is informed and believes, and upon such information and belief denies that all of said documents described in [45] said subpoenas and required to be produced by affiant are now and were at the time of the issuance of said subpoena relevant and material to said investigation, or any investigation, and denies upon such information and belief that the testimony of respondents and each of them required by said subpoenas is also relevant thereto.

That affiant is informed and believes, and upon such information and belief, denies that the documents required by said subpoenas to be produced are now and at all times mentioned in the petition have been under the control of the respondents Jack Aros and Everett Hagan, or either of them.

That all the books and records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Company are the property of J. A. Hagan, doing business as the El Rey Cheese Company, and are not under the control of affiant nor are they affiant's property.

EVERETT HAGAN

Subscribed and sworn to before me this 26th day of October, 1945.

[Seal]

MACARIO V. BALLESTEROS

Notary Public in and for said
County and State.

Received copy of the within Affidavit this 29th day of Oct., 1945.

ELEANOR SHUR

Attorney for Petitioner

[Endorsed]: Filed Oct. 29, 1945. [46]

[Title of District Court and Cause.]

ORDER REQUIRING RESPONDENTS TO
TESTIFY AND TO PRODUCE CERTAIN
DOCUMENTS

This matter of the Petition for an Order Requiring Respondents to Testify and to Produce Certain Documents having come on to be heard at 10 o'clock a.m., October 29, 1945, upon the verified application of Chester Bowles, Price Administrator, supported by exhibits and affidavits, and it appearing to the Court that respondents Jack Aros and Everett Hagan and each of them have failed and refused to appear to testify in the manner and at the time and place designated in the subpoenas duces tecum, duly issued by Chester Bowles as Price Administrator of the Office of Price Administration, on file herein, and it further appearing [47] that respondents Jack Aros and Everett Hagan and each of them have refused to and have not produced any of the documents and records described in said subpoenas duces tecum at the time and place designated therein or at any time or place in response to said subpoenas duces tecum,

served upon respondents and each of them on August 13, 1945,

It Is Hereby Ordered, Adjudged and Decreed that respondents Jack Aros and Everett Hagan and each of them appear at the Los Angeles District Office of the Office of Price Administration located at 1031 South Broadway, Los Angeles, California, before Eleanor Shur, Enforcement Attorney, at 10:00 a. m. on the 1st day of November 1945, to testify and to produce the following records:

All the books, records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Co. for the period from September 28 to October 2, 1942, covering the purchase, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

All the books, records, ledgers, day books, purchase and sales invoices of the El Rey Cheese Co. for the period from June 15, 1944, to and including July 28, 1945, covering the purchases, sales and deliveries made by the El Rey Cheese Co. of Swiss Gruyere Type Cheese and Taylor-Maid Gruyere Type Swiss Cheese.

If respondents and each of them make the above described records available for inspection and copying by an accredited representative of the Office of Price Administration at the place of business of respondents and each of them at 119-121 North Eastern Avenue, Los Angeles, California, on or before 4 o'clock p. m., October 31, 1945, and keep such records available during the ordinary business

hours of the day for so long as may be reasonably necessary for such inspection and copying, respondents [48] and each of them shall then be relieved of the obligation to produce such records at the Office of Price Administration at the time and place as above set forth.

Dated at Los Angeles, California, this 29th day of October, 1945.

BEN HARRISON

United States District Judge

Judgment entered Oct. 29, 1945. Docketed Oct. 29, 1945. Book C.O. 35, page 414. Edmund L. Smith, Clerk. By Murray E. Wire, Deputy.

[Endorsed]: Filed Oct. 29, 1945. [49]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that J. A. Hagan, individually, and doing business as El Rey Cheese Co., and Jack Aros and Everett Hagan, respondents above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on October 29, 1945.

ABRAHAM GOTTFRIED

Attorney for Appellants

[Endorsed]: Filed Oct. 31, 1945. [50]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

It Is Hereby Designated by Appellant that the following portions of the record proceedings and evidence be contained in the record on appeal:

(1) Petition for an Order Requiring Respondents to Testify and Produce Certain Documents;

(2) Order to Show Cause;

(3) Memorandum of Points and Authorities in Support of Petition for an Order to Show Cause;

(4) Affidavit of Eleanor Shur;

(5) Reply of Respondents Jack Aros and Everett Hagan;

(6) Affidavit of Jesus Aros;

(7) Affidavit of Everett Hagan;

(8) Transcript of proceedings of Monday, October 29, 1945. [51]

(9) Order Requiring Respondents to Testify and Produce Certain Documents.

ABRAHAM GOTTFRIED

Attorney for Respondents

(Affidavit of service by mail attached.)

[Endorsed]: Filed Nov. 9, 1945. [52]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 53, inclusive, contain full, true and correct copies of Petition for an Order Requiring Respondents to Testify and to Produce Certain Documents; Affidavit of Eleanor Shur; Memorandum of Points and Authorities in Support of Petition for Order to Show Cause; Order to Show Cause; Reply of Respondents J. A. Hagan, etc., et al, to Order to Show Cause, etc.; Affidavit of Everett Hagan; Affidavit of Jesus Aros; Order Requiring Respondents to Testify and to Produce Certain Documents; Notice of Appeal; and Designation of Contents of Record on Appeal which, together with copy of Reporter's Transcript of Proceedings on October 29, 1945, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.45 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 28th day of November, 1945.

[Seal] EDMUND L. SMITH,
Clerk

By THEODORE HOCKE
Chief Deputy Clerk

In the District Court of the United States in and
for the Southern District of California, Central
Division

Honorable Ben Harrison, Judge Presiding.

No. 4819-BH-Civil

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

J. A. HAGAN, Individually, and doing business as
EL REY CHEESE CO., JACK AROS, and
EVERETT HAGAN,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Monday, October 29, 1945

Appearances: For the Plaintiff: H. Eugene Breitenbach, Wm. U. Handy and Eleanor Shur, 1031 South Broadway, Los Angeles, California. For the Defendant: Abraham Gottfried, 403 West Eighth Street, Los Angeles, California. [1*]

The Clerk: No. 4819 Civil, Chester Bowles vs. J. A. Hagan, individually, and doing business as El Rey Cheese Company, Jack Aros and Everett Hagan.

Miss Shur: If the Court please, we are in a

*Page numbering appearing at top of page of original Reporter's Transcript.

rather peculiar situation here this morning, and I think I will just present to the Court what happened and see what the Court thinks of it.

The affidavits of service or whatever document or record the Marshal keeps of service show that service of all documents was made on the respondents, Jack Aros and Everett Hagan, on October 15, although Judge McCormick had given us until the 17th to have all the documents served.

Now, no documents, no pleadings, no points and authorities, no affidavits were served on the petitioner until this morning when I appeared in court. Counsel for the respondents has had 14 days in which to prepare his documents and only served us this morning, and I don't feel that we should be called upon to have to argue the matter or that these documents which were served on us this late should be admitted on this argument.

If Judge McCormick had given the parties a short time in which to serve, or had imposed any sort of a burden upon respondents where they did not have a full 10 days in which to [2] answer to our points and authorities on this motion, I would not be quite so legalistic, but they had not only 10 but 14. There was no call put in to our office asking an extension of time or anything else, and I feel in the light of that the points and authorities, the reply of respondents, should not be considered at this time and that we should take judgment on our motion, and that the order should be issued.

The Court: Counsel, the rules require that they make some response, do they not?

Mr. Gottfried: Unless my understanding is incorrect, in a case where a memorandum of points and authorities is filed in support of a motion, there is a rule, if your Honor please, as I understand it, that the respondent should file counter points and authorities within five days of the hearing. But, in this particular case there is an order to show cause, naming this defendant as the defendant upon which to show cause.

Now, we have shown cause why the order should not issue in the form of affidavits, and could have brought the witnesses here personally to put them on the stand.

The Court: What is this all about?

Miss Shur: If the Court please, this is the situation. Under the Emergency Price Control Act the Administrator is given the right under Section 202(a) and Section 202(b) to require the inspection of any records which will assist in [3] prescribing regulations or which will assist in enforcement.

Under that Section 202, there is a further power given to the Administrator to issue a subpoena to obtain any of the records or documents which will assist him in the enforcement of the OPA regulations. Now, under that authority in May information had been brought to the Office of Price Administration that the respondents were in violation of certain regulations covering the sale of cheese, and in the normal course of business we sent investigators out to view the records. After all, in this type of violation of the statute or regulation you can't tell whether there is a violation unless you see the

sales records and records which determine prices, and therefore this type of thing comes squarely under Section 202(a) and Section 202(b). That was on May 21st. The records were refused.

I subsequently had a telephone conversation with one Mr. William Leavitt. When the records were refused, we then issued subpoenas from the Los Angeles district office under Order No. 53 wherein Chester Bowles has delegated to the district directors the right to issue subpoenas and the right to make inspection of records. That was issued, I believe, on June 9th or thereabouts.

The Court: Well, the records that are asked for here have a semi-public status?

Miss Shur: Yes, your Honor, those are the documents [4] which under a number of decisions have been held to have a quasi-public nature under this type regulation. That subpoena was issued by our district director on June 9, shortly after Mr. Leavitt, representing himself as the person served with the subpoena, called our office and stated he was not going to have the parties served answer to that subpoena.

I was then assigned the case and I called Mr. Leavitt to determine exactly what he had on his mind, and he stated that since this was not a subpoena signed by Chester Bowles himself with his own hand, that they would not answer that subpoena. As a matter of fact, at that time under the status of law, we could have asked the court for an order to show cause because under General Order 53 Chester Bowles has delegated his right to in-

spect the records and to issue subpoenas to the district office, and there is case law stating that it would be a ridiculous requirement to require a man in the position of Chester Bowles to put his signature on every single document.

The Court: The subpoena duces tecum has been served?

Miss Shur: That is correct.

The Court: And they have not responded to it, and that is the reason for these proceedings?

Miss Shur: That is correct, your Honor. However, we did actually get a Chester Bowles' signature.

The Court: What is your position? [5]

Mr. Gottfried: In the first place, if your Honor will please note, there are three respondents named in the petition, J. A. Hagan individually and doing business as El Rey Cheese Company, Jack Aros, and Everett Hagan. There has been no service made upon the man doing business, J. A. Hagan, by subpoena or by the order to show cause. The two people who were served appear by the very petition itself to be merely employees of J. A. Hagan.

Now, it is our contention that employees of a concern do not have the records under their custody and control and the records are not quasi-public insofar as they are concerned. The authority of Glick Bros. Lumber Company case holding the records to be quasi-public was this, and that is if a man wants to do business under certain regulations, he must comply with the record-keeping provisions

of those regulations, and to that extent they waive that portion of the immunity provision of the constitution because he has a choice of not doing business in that particular instance.

These people who are served, and for whom I am appearing here, are merely employees and no attempt has been made to serve the owner either under subpoena process or with the order to show cause and I think, if your Honor please, the provisions of the Emergency Price Control Act are directed towards the person who himself is engaged in business. These people are not engaged in business. I think that insofar as they are [6] concerned——

The Court: Your point is that they have failed to serve Mr. Hagan?

Mr. Gottfried: Yes.

Miss Shur: If the Court please, Mr. Gottfried is very well aware of the fact that J. A. Hagan, although he owns the business, resides, I think, in either Clifton or Morenci, Arizona. He does not operate the business. He has placed the business in the hands of his brother, Everett Hagan, and Jack Aros.

Mr. Gottfried is also aware of the fact that these two gentlemen between them are bookkeeper and manager of that business and there would be no purpose in serving Mr. J. A. Hagan because the records and everything are under the management and control of these two gentlemen.

The Court: I am going to issue an order that

the two parties—what day do you want them to appear?

Miss Shur: Any day other than the 31st of October will be agreeable.

The Court: How about the 1st of November?

Miss Shur: That would be fine.

The Court: I am going to issue an order to appear on November 1st at 10:00 o'clock at the Office of Price Administration in Los Angeles, California, to testify and produce the documents in answer to the subpoena duces tecum attached [7] to the petition. We will try it out. If they don't appear, then we can try it out on contempt.

Mr. Gottfried: May I have a stay of execution, if your Honor please, for this reason. I wish to serve oral notice of appeal at this particular time.

The Court: I am not going to grant a stay of execution. If they don't appear, we will cite them for contempt and if I find them in contempt and send them to jail, you can get out a writ of habeas corpus.

Mr. Gottfried: I just want to clarify a question of law, if I may. The appeal court has held that the order your Honor has just made is a final order and one which is appealable; that it is improper to test it by placing the defendants in contempt, but the proper time to test it is after the order is made and before the parties are placed in contempt. I cite your Honor authority—

The Court: Well, counsel knows fully well that before any appeal could be determined on this, it will be moot and the purpose of it will be destroyed.

Now, this court is not going to grant a stay of execution. If the Circuit Court desires to make ineffective the Price Administrator by granting a stay of execution, that is its privilege, but this court is not going to be a party to it. If they don't appear at that time, unless the Circuit Court intervenes in the meantime, then somebody is going to jail and you can try it out. [8]

Mr. Gottfried: If the court please, is it not a correct statement of law that the appeal automatically stays the order?

The Court: I don't know whether it does or not.

Mr. Gottfried: That wasn't what——

The Court: I am not going to cross that bridge until I come to it, but I will say now, so counsel will know, that I haven't any sympathy for an officer of this court that attempts to interfere with the proper administration of war measures. I want you to know that.

Mr. Gottfried: If your Honor please, the question of materiality which we have raised at that particular time has not been gone into by the court.

The Court: I have gone into the government's statement here that these men are in charge of the business and in possession of these records; that the owner lives without the jurisdiction of this court. Therefore, this court would be helpless to do anything and the OPA would be helpless.

Now, I don't think that the law is going to sanction those things. It may be. It may be that you can get away with it. Maybe you can get some satisfaction out of interfering and advising your clients to

ignore these subpoenas. Maybe the money you will make out of it will create considerable satisfaction in your own mind, but to me one that helps to interfere with measures that help to make it possible for [9] these men to live and exist and have freedom, I wouldn't be happy about it.

Mr. Gottfried: Well, if your Honor please, I think your Honor is mistaken on several points, if I may respectfully say so. One is that there was no lack of appearance. We did appear. Secondly, we are questioning the materiality of evidence which they desire, which we have a right to question, and the authorities we have cited have held that it is necessary to the proof to make orders to show cause show materiality of evidence. Of course, if we are convicted without a hearing on the ground that the OPA issues a subpoena which may not be valid itself, we must remove all constitutional protections we have. Of course, that is a different proposition, but in this particular case there is no showing of materiality whatever.

The Court: Just a moment, counsel. If there are any questions there that they don't want to answer because they hold they are immaterial and those questions are brought into this court as to whether they are material or not, then I will pass on the materiality.

I had another case, not under the OPA, but we had that very question and the party refused to answer certain questions. Then they were brought into court to show cause why they should not be punished for contempt and the questions were gone over and

the court made an order at that time for [10] certain questions to be answered and other questions it said did not have to be answered.

If there are questions there that are asked which tend to incriminate and the witness refuses to testify on that ground, then they can cite them in for contempt before this court and I will determine at that time whether they should answer or not, and if they are incriminating, of course I will not require them to answer.

Mr. Gottfried: Well, all I can do, your Honor, in preparing for this order to show cause is go by the cases as they have come down.

The Court: You people probably know more about the procedure than I do. I know that the Congress of the United States has provided for the issuance of subpoenas. The subpoenas have been served and the parties have not responded.

Mr. Gottfried: If your Honor please, we did respond and responded at the time questioning the validity and materiality. If your Honor will look at the subpoena, it says "produce records, etc." How can we determine what is meant by the "etc."?

The Court: I don't think there is any question about what is meant by that.

Mr. Gottfried: I think I would just like to call your Honor's attention to the case of *Bowles v. Cherokee Textile Mills* in which an exactly similar situation was involved and [11] presented in this same manner. In that case the question also came up as to what Congress intended. The Office of Price Administration took the position that just

because they asked for the information that that made it material and the court could not require on the order to show cause, not after hearing was held, as to whether that was material.

The court stated:

“I think that Congress did not so intend, for if such determination is not subject to judicial review the statute would so ignore the constitutional safeguards as to render the provision invalid. It is argued that the language of Section 202(a) of the Emergency Price Control Act of 1942 leaves no doubt of the congressional intent to vest in the Administrator the exclusive right to determine the question of materiality or evidential value. The statute provides, Section 202(a), 50 USCA Appendix, Section 922: ‘The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders and price schedules [12] thereunder . . .’

“It is my opinion, after considering the cases cited by counsel which bear upon the question, that it was squarely before the Circuit Court of Appeals for the Sixth Circuit in *Goodyear Tire & Rubber Co. v. National Labor Relations Board*, 122 Fed (2d) 450, at 453, in which the court said, in part: ‘The statute does not require the District Court to issue the order, but simply gives it jurisdiction to issue. The enforcement of the subpoena is thus

confided to the discretion of the District Court, which is to be judicially exercised. We think that the review in this case extends no further than the determination as to whether or not there was an abuse of its discretion. Applying this rule, we think that it was open to the company to contend that the documents called for do not relate to the particular matter in question; that this contention made in the answer raises an issue of fact for determination by the court, and if determined in its favor that the application of the Board as to documents found not so to relate should be dismissed upon the merits.' "

The Court goes on to say: [13]

"It is true that the statute here involved uses language broad enough to authorize the court to compel production of documents, etc., whether of evidential value or not, but I cannot assume, as said in the *American Tobacco Co.* case, 264 US at 305, 'that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 US 447, 479) and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent.' "

The Court goes on to state:

"Before the courts are permitted to strike down enactments of the Congress upon the idea that the

Congress intended to compel a citizen to do that which the Constitution says he may not be required to do, the language used in the statute must be so clear and specific as to permit no other reasonable construction consistent with organic law. I believe the language here used may be reasonably construed [14] to relate to documents and to testimony with respect to matters material to a determination of the question under investigation, that is, the price at which a certain commodity shall be sold. My conclusion is that the court has jurisdiction to determine the question whether the matter called for in the subpoena is material to the determination the Administrator is authorized to make, but before the aid sought by the administrator will be granted, it must appear from evidence that the papers, documents or evidence which are sought are material to a determination of the matter under investigation. I think this action will dispose of the motion to strike portions of the answer, since the narrow question is whether the administrator is given sole authority to determine relevancy and materiality. I do not think the Congress so intended.

“An order may be prepared for approval and entry denying the relief sought until it shall appear from evidence that the court, in the exercise of sound judicial discretion, should require the production of the evidence sought, because the same is material to the determination the administrator is authorized to make.” [15]

Then, going on to the case of *Bowles v. Beatrice*

Creamery Company, 146 Fed. (2d) 774, Tenth Circuit Court of Appeals decision, the court specifically stated that the way to test validity of subpoena is by refusing to answer the subpoena and bringing it into court for that purpose. The court in that particular case did not state that the defendants were interfering with the functioning of war measures, but stated as follows:

“There are cogent reasons why production and inspection should only be compelled by lawful process. Where the production is in response to lawful process, the owner of the books and papers is afforded protection by the limitations which the law imposes with respect to lawful process. Such process must state the subject of the inquiry, must particularly describe the books and papers so that they can be readily identified, and must limit its requirements to books and papers that are relevant to the inquiry. In other words, such process must confine its requirements within the limits which reason impose in the circumstances of the particular case. Moreover, the person to whom such process is addressed may challenge its legality before being compelled to respond thereto.”

Now, I have cited these cases merely for the purpose of [16] showing that it is not an unheard of thing to take advantage of our constitutional rights.

The Court: I am not trying to interfere with your constitutional rights. My course of procedure is this, and is one that this court has heretofore followed. I am going to require them to respond to the subpoena.

Mr. Gottfried: Well, if I understood what your Honor's practice was, I certainly would have followed it.

The Court: And then if there are any questions that are asked that tend to incriminate or any other question you feel they should not answer, you can advise your clients not to answer and then it would be brought into this court in a sense just like a deposition, and the court will pass upon whether it is a material question or tends to incriminate. That is the procedure I expect to follow.

I will say frankly that this court will not require them to answer any questions that tend to incriminate. I want to state, Miss Shur may know, I am very much in accord with Judge St. Sure's opinion.

Miss Shur: If the court please, I think you will note reading our subpoena there certainly was nothing there that would tend to be incriminating. We merely ask, first, for the records covering the base period which would determine the price of this commodity. We ask next for the sales records and purchase records from the time of our subpoena to a year [17] ago in retrospect because we have a one-year statute of limitations and could not bring any——

The Court: You prepare your order and then when the questions come up, why, if they do not answer the questions we will hear it then on the questions raised by counsel. I want you to know that I am in accord, I was not at the beginning, but after further study and thought I am in ac-

cord with Judge St. Sure's opinion and I don't feel that you can compel anybody to furnish information upon which you can impose a penalty.

Miss Shur: If the court please, I don't think that was the purpose of this investigation.

The Court: The only thing is that if it is a fishing expedition to determine whether you can impose treble damages, this court will not require them to answer the questions.

Miss Shur: If the court please, any treble damages that would result would not be brought against the people who had custody and control of the books. It would lodge against the person who owned the business.

The Court: Well, that is something we will cross when we come to it.

Mr. Gottfried: I wish to state for the record that the purpose of bringing the proceedings up in this particular manner was merely because that was the method outlined by the cases which I have cited, not being familiar with your Honor's [18] procedure.

The Court: You may be correct as to the proper procedure, but this court feels that when a person does not respond to a subpoena and ignores it——

Mr. Gottfried: I did respond, your Honor. I appeared at the subpoena hearing. I am sorry that the matter was presented as it was, as vague as it was. I won't take any more of the court's time, but I should like to clarify our position in this matter.

Your Honor will recall that V-J Day was declared to be a holiday and unknowing to the gov-

ernment was set for that particular hearing. Now, what the status of that legal holiday was still remains to be clarified. There have been lots of disputes about it, but Miss Shur called me up at my home on V-J Day and said that despite the fact that everybody else would be off and the office would be closed, she would be present and expected us to have our clients there.

The Court: She was getting ready for that honeymoon.

Mr. Gottfried: I know that I questioned the validity of the subpoenas and I know I questioned the materiality of the information they wanted. I told Miss Shur that we had discussed the entire matter with the price section and that the price section had approved our action and if she would consult with them it would shorten the entire matter. I told her that I didn't know if I could get in touch with my clients. I [19] tried but was unable to do so. I appeared, however, and made our claims as to the validity of the subpoena and the materiality of the information.

No recommendation was made by the OPA immediately, but the first thing we knew we had this order to show cause to face. Now, if we questioned the materiality of the evidence then, naturally we had to follow up with this order to show cause and question it before your Honor. Now, if I had known that your Honor would rather have had us make the record on subpoena and then have it brought up on order to show cause as to whether certain questions should be answered, I certainly would

have done it that way rather than incurring a lecture from your Honor. I certainly did not invite or enjoy it. Now, that is the way the matter came up.

The Court: I will say this, that if an objection is made to a question and the question is not answered, the court will then give the party an opportunity to answer those questions, and that is all I can do. It is objected to and all I can do is counsel them to answer the questions. That is as far as I can go, and, of course, if the questions are immaterial or tend to incriminate and violate the constitutional rights, why, of course, this court is not going to make them answer.

Miss Shur: Well, if the court please, this is a matter that has had a rather long history with our office and certainly [20] we have no intention of asking any questions that are going to be incriminatory. Our sole purpose is to see the sales records of this company which, under the Act, we are entitled to do. However, not only our office, but other offices of the Office of Price Administration have been refused any access whatsoever or at all to its records. Now, frankly I think that is a distinct flouting of law whether with or without legal advice.

There is a long line of case history which will show that we have a right to inspect those records; that there is no violation of the constitution when we do see those records. The records specifically requested by the Emergency Price Control Act and by regulations that cover these sales of cheese——

The Court: Well, we will handle it that way.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5 day of November A. D., 1945.

MYRTLE SANALLACH,
Official Reporter

[Endorsed]: Filed Nov. 9, 1945.

[Endorsed]: No. 11197. United States Circuit Court of Appeals for the Ninth Circuit. J. A. Hagen, individually, and doing business as El Rey Cheese Co., Jack Aros and Everett Hagan, Appellants, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 29, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11197

J. A. HAGAN, individually, and doing business
as EL REY CHEESE CO.; JACK AROS and
EVERETT HAGAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellee.

POINTS ON WHICH APPELLANTS INTEND
TO RELY ON APPEAL AND DESIGNA-
TION OF THE RECORD NECESSARY
FOR THE CONSIDERATION THEREOF

Appellants respectfully state that the points
upon which they intend to rely on appeal are as
follows:

1. That the Court below erred in refusing to
require the Appellee to prove service of the Order
to Show Cause upon the Appellants, or upon all
the Respondents in the proceeding.

2. That the Court below erred in refusing to
hear any evidence on the question of the validity
of the execution and issuance of the subpoenas.

3. That the Court below failed to require the
Appellee to prove the relevancy or materiality of
the books, papers, documents and testimony re-

ferred to in the said subpoenas, and that the Order of the Court below was made without a scintilla of proof of the said materiality and relevancy.

4. That the Court below erred in not requiring the Appellee to show which commodity was being investigated by it, or which of the regulations issued by the Office of Price Administration governed the sale of said commodity.

5. The Court below held that the Appellants had failed to answer and appear at the time and place called for in said subpoenas; and that the Court below should have held that there was no failure on the part of the Respondents to appear at the time and place called for in the subpoenas.

6. That the said subpoenas were inadequate in that the Appellants should not be forced to guess as to what is meant by the letters "etc." appearing therein.

7. That the said subpoenas constitute an unreasonable search and seizure contrary to the 4th Amendment of the Constitution of the United States.

8. That the said subpoenas violated Appellants' right against self-incrimination contrary to the 5th Amendment of the Constitution of the United States.

9. That Appellants are merely employees and that the documents referred to in said subpoenas are not within the custody or control of Appellants

within the meaning of the applicable law and regulations.

Dated: Los Angeles, California, November 27, 1945.

ABRAHAM GOTTFRIED

Attorney for Appellants

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed November 29, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellants respectfully state that the entire certified record will be necessary for the consideration of the points on which appellants intend to rely on appeal and, therefore, designate the entire record as certified by the Clerk of the United States District Court for the purposes of paragraph 6 of Rule 19.

Dated: Los Angeles, California, December 19, 1945.

ABRAHAM GOTTFRIED

Attorney for Appellants

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed December 22, 1945. Paul P. O'Brien, Clerk.

